

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES MICHAEL STONE,  
Petitioner,

v.

WARDEN, MULE CREEK STATE  
PRISON,  
Respondent.

No. 2:21-cv-1708 TLN AC P

FINDINGS AND RECOMMENDATIONS

Petitioner is a California state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The action proceeds on a petition which challenges petitioner's 2015 conviction for two counts of lewd and lascivious conduct on a child under 14 years of age. ECF No. 1. Respondent has answered, ECF No. 14, and petitioner has filed a traverse, ECF No. 20.

BACKGROUND

I. Proceedings in the Trial Court

A. Preliminary Proceedings

Petitioner was charged in Placer County with three counts of lewd and lascivious conduct on a child under 14 years of age, involving two different victims, along with various enhancements and alleged prior convictions.

1 B. The Evidence Presented at Trial

2 1. Prosecution Case<sup>1</sup>

3 a. Molestation of Jane Doe No. 1

4 On New Year's Day 2012, petitioner was visiting his sister, her husband, and their son.  
5 Also present was a friend and her eight-year-old daughter, Jane Doe No. 1. Petitioner was  
6 cooking breakfast and Jane Doe No. 1 was watching him. Petitioner touched her on her private  
7 part over her clothes. (At trial, Jane Doe No. 1 testified that petitioner touched her vagina. In an  
8 interview with the Multi-Disciplinary Interview Center (MDIC), she said that he touched her butt  
9 and grabbed her hand and made her touch and rub his penis, which she described as his "middle  
10 part" that he uses to pee.) She ran away. Later that day petitioner called to her and led her to a  
11 bedroom where he tried to kiss her. He put his tongue in her mouth, which she found to be  
12 "gross." After her mother returned from taking petitioner home, Jane Doe No. 1 told her mother  
13 what had happened.

14 Jane Doe No. 1's mother sent petitioner a text message a few days later. She told him he  
15 was a "sick fuck" and that her daughter "told me." Petitioner responded, "Oh, that I touched her?  
16 I didn't mean to, and I told her I was sorry. Really, I didn't mean to." Petitioner sent the  
17 message, "I really feel like crap. I really didn't mean to." "I told her I was sorry and I didn't  
18 mean to. I didn't know I made her feel bad about it. I'm so sorry." He sent several text  
19 messages that asked her not to hate him and to say something. The mother responded, "How do  
20 you not mean to?" Petitioner replied, "We were goofing around and it happened. I would never  
21 intentionally want to make her feel weird around me." "I feel like a dirty bastard." When the  
22 mother did not respond, petitioner asked her to talk to him. The mother declined to do so. A few  
23 months later, she called the police because she was concerned petitioner might be touching other  
24 children.

25 b. Molestation of Jane Doe No. 2

26 Jane Doe No. 2 ("J.D.") is petitioner's daughter; she was four years old at the time

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28 <sup>1</sup> This summary is adapted from the opinion of the California Court of Appeal, ECF No. 15-13 at 3-8.

1 petitioner was arrested. D.S. is her mother. She and petitioner were married and have two  
2 children. They had separated many times and by the time of trial had not lived together for a few  
3 years. In July 2012 the children stayed with petitioner a few times. On August 8, 2012, D.S.  
4 learned that petitioner had been arrested for child molestation. She spoke to J.D. about good and  
5 bad touches and asked if Daddy had ever touched her or hurt her. J.D. said yes. After further  
6 questioning, J.D. said, "Daddy touched my 'gina' and it hurt."

7 D.S. made an appointment with J.D.'s doctor. The pediatrician examined J.D. the next  
8 day. He asked her if anyone had touched her in a bad way and she said yes. She said Daddy  
9 touched her and it hurt. She indicated he touched her vagina. The doctor examined her genitals  
10 and found no trauma.

11 J.D. told a social worker from Child Protection Services that her father touched her "down  
12 there" and pointed to her vagina.

13 J.D. was interviewed at the Multi-Disciplinary Interview Center (MDIC). The interview  
14 was videotaped and the recording was played at trial. In the interview, J.D. said her father was  
15 touching her "gina" and it hurts. She said it occurred at the home of petitioner's sister. She said  
16 it was scary like a movie and refused to tell more because "it's just a bad thing." "It's kinda  
17 spooky." After a break, J.D. said her younger brother stopped daddy and "saved me." She said  
18 her father "dicked me." She said that meant weird things. "It's so scary. It's like Daddy won't  
19 stop." She said he stuck her with his "peanut" and "wiggled me," demonstrating hip thrusts. She  
20 said petitioner did not say anything, but she said stop; she wanted him to stop his "peanut" which  
21 jiggled, "Like he was already popped." She drew a picture of defendant "dicking her." "He said,  
22 I'm gonna dick you." J.D. said what happened at her aunt's house was "daddy's fault." "He  
23 would just do it again." He would do it after she said stop.

24 At trial, J.D. refused to answer any questions about the alleged molestation or her  
25 discussions with others about the allegations. She repeatedly gave answers which were non-  
26 sequiturs or nonsensical. She said that no one had ever touched her arm and that she did not  
27 recognize her father. She finally began discussing Halloween costumes and trick or treating until  
28 both defense counsel and the prosecutor gave up.

1 c. Propensity Evidence

2 As permitted by California law, the prosecution introduced evidence of petitioner's prior  
3 convictions and pictures of child pornography on his phone. In 2002 petitioner had been  
4 convicted of three misdemeanor counts of annoying or molesting a child. In 2000 he was  
5 convicted of committing a lewd and lascivious act on a child under the age of 14. The police  
6 downloaded 25 images of child pornography from petitioner's cell phone.

7 2. Defense Case

8 The defense offered the testimony of petitioner's sister and her husband that they did not  
9 observe any inappropriate behavior by defendant on New Year's Day, and that Jane Doe No. 1  
10 did not appear upset and did not avoid petitioner that day. Three character witnesses testified  
11 they had never observed petitioner behave inappropriately around their children and they trusted  
12 him. There was evidence that Jane Doe No. 1 sometimes lied.

13 Petitioner testified he touched Jane Doe No. 1 below the waist while he was tickling her.  
14 When she said, "don't," he stopped. He denied he touched her genitals or buttocks or moved her  
15 hand to his body. He testified she followed him down the hall when he went to take a nap. He  
16 told her playtime was over and she was disappointed. She gave him a hug when he left. He  
17 denied any inappropriate conduct with J.D.

18 Petitioner denied ever deliberately accessing child pornography; he sometimes  
19 downloaded entire files that contained groups of pictures. He had a "game" with friends,  
20 exchanging obscene pictures. He looked for "oddities," such as obese men and women in "bitty"  
21 thongs.<sup>2</sup>

22 C. Outcome

23 The jury returned guilty verdicts on two counts of lewd and lascivious conduct involving  
24 Jane Doe No. 1, and one count of lewd and lascivious conduct involving Jane Doe No. 2. The  
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27 <sup>2</sup> In rebuttal, a detective testified he reviewed 5,600 images that were downloaded  
28 from petitioner's phone. None were "oddity" pornography and only one depicted male  
genitalia.

1 jury also found that the case involved multiple victims within the meaning of Cal. Penal Code §  
2 667.61(e)(4).

3 Various prior conviction allegations were bifurcated and tried to the court. The court  
4 found all but one of the allegations to be true. The court denied petitioner's new trial motions,  
5 and also denied a motion to dismiss the "strike" allegations for purposes of sentencing. Petitioner  
6 was sentenced to a total term of 155 years to life imprisonment.

7 II. Post-Conviction Proceedings

8 Petitioner timely appealed. On March 12, 2019, the California Court of Appeal reversed  
9 the conviction on Count Three (involving Jane Doe No. 2), and the multiple victims  
10 enhancement, on grounds that admission of Jane Doe No. 2's MDIC interview had violated  
11 petitioner's right to confrontation in light of her refusal or inability to testify. ECF No. 15-8. The  
12 judgment was affirmed as to Counts One and Two (the Jane Doe No. 1 counts). Id. On May 22,  
13 2019, the California Supreme Court denied review. ECF No. 15-15. On October 30, 2019,  
14 petitioner was resentenced in superior court to 100 years to life.

15 Petitioner filed a petition for writ of habeas corpus in the Placer County Superior Court on  
16 June 10, 2019, which was denied in a written decision on October 18, 2019. ECF Nos. 15-16, 15-  
17 17. Petitioner filed another habeas petition in the Placer County Superior Court on April 15,  
18 2020, which was denied in a written decision on April 23, 2020. ECF Nos. 15-18, 15-19.

19 Petitioner next filed a habeas petition in the California Court of Appeal, which was denied  
20 without comment or citation on July 17, 2020. ECF No. 15-21. Petitioner thereafter filed another  
21 habeas petition in the appellate court, which on September 18, 2020 was also denied without  
22 comment or citation. ECF No. 15-23.

23 Petitioner went on to file a habeas petition in the California Supreme Court,<sup>3</sup> which was  
24 denied on February 10, 2021. ECF No. 15-25. A second petition to the California Supreme  
25 Court was denied on July 21, 2021. ECF No. 15-27.

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28 <sup>3</sup> This petition contained no claims for relief, but made a conclusory request for "summary judgment" on the petition(s) previously filed in the Court of Appeal. ECF No. 15-24.

STANDARDS GOVERNING HABEAS RELIEF UNDER THE AEDPA

28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), provides in relevant part as follows:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The statute applies whenever the state court has denied a federal claim on its merits, whether or not the state court explained its reasons. Harrington v. Richter, 562 U.S. 86, 99 (2011). State court rejection of a federal claim will be presumed to have been on the merits absent any indication or state-law procedural principles to the contrary. Id. (citing Harris v. Reed, 489 U.S. 255, 265 (1989) (presumption of a merits determination when it is unclear whether a decision appearing to rest on federal grounds was decided on another basis)). “The presumption may be overcome when there is reason to think some other explanation for the state court’s decision is more likely.” Id. at 99-100.

The phrase “clearly established Federal law” in § 2254(d)(1) refers to the “governing legal principle or principles” previously articulated by the Supreme Court. Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). Only Supreme Court precedent may constitute “clearly established Federal law,” but courts may look to circuit law “to ascertain whether...the particular point in issue is clearly established by Supreme Court precedent.” Marshall v. Rodgers, 569 U.S. 58, 64 (2013).

A state court decision is “contrary to” clearly established federal law if the decision “contradicts the governing law set forth in [the Supreme Court’s] cases.” Williams v. Taylor, 529 U.S. 362, 405 (2000). A state court decision “unreasonably applies” federal law “if the state court identifies the correct rule from [the Supreme Court’s] cases but unreasonably applies it to

the facts of the particular state prisoner’s case.” Id. at 407-08. It is not enough that the state court was incorrect in the view of the federal habeas court; the state court decision must be objectively unreasonable. Wiggins v. Smith, 539 U.S. 510, 520-21 (2003).

Review under § 2254(d) is limited to the record that was before the state court. Cullen v. Pinholster, 563 U.S. 170, 180-181 (2011). The question at this stage is whether the state court reasonably applied clearly established federal law to the facts before it. Id. at 181-182. In other words, the focus of the § 2254(d) inquiry is “on what a state court knew and did.” Id. at 182. Where the state court’s adjudication is set forth in a reasoned opinion, §2254(d)(1) review is confined to “the state court’s actual reasoning” and “actual analysis.” Frantz v. Hazey, 533 F.3d 724, 738 (9th Cir. 2008) (en banc). A different rule applies where the state court rejects claims summarily, without a reasoned opinion. In Richter, supra, the Supreme Court held that when a state court denies a claim on the merits but without a reasoned opinion, the federal habeas court must determine what arguments or theories may have supported the state court’s decision, and subject those arguments or theories to § 2254(d) scrutiny. Richter, 562 U.S. at 102.

## DISCUSSION

### I. Claims One and Two: Ineffective Assistance of Counsel

#### A. Overview

Claim One alleges ineffective assistance of appellate counsel and Claim Two alleges ineffective assistance of trial counsel. Because these claims are factually and legally interrelated, the court considers them together. Here they are addressed in reverse order for ease of analysis.

### B. Petitioner’s Allegations and Pertinent State Court Record

#### 1. Trial Counsel

In Claim Two, petitioner alleges that trial counsel was ineffective in the following ways. First, counsel “failed to do any investigation on defendant’s cell phone when images of scantily dressed young girls were found by the prosecution. Defense had been provided with the downloaded contents of defendant’s phone in October of 2013 but never reviewed that download.” ECF No. 1 at 7. Although the petition lacks factual detail, the record reflects that petitioner—through counsel appointed for the purpose of a new trial motion—sought a new trial

1 on grounds of an illegal cellphone search and trial counsel's ineffectiveness in failing to move for  
2 suppression of photographic evidence seized from the phone. II CT 452-467 (ECF No. 15-2 at  
3 161-176).

4 Second, counsel refused to call as an expert witness Dr. William T. O'Donohue, a child  
5 psychologist specializing in abused children. Counsel did not believe that Dr. O'Donohue's  
6 testimony would be sufficient to refute the testimony of Jane Doe No. 1, but during a posttrial  
7 hearing the expert testified that he had not been provided all the documents necessary for a  
8 complete evaluation. Counsel did think that Dr. O'Donohue's testimony could refute that of Jane  
9 Doe No. 2, but did not think it would be "much of a victory to have Mr. Stone found guilty of  
10 Counts 1 and 2 and only avoid conviction as to Count 3." ECF No. 1 at 7-8. Although the  
11 petition lacks both factual detail and a proffer of the expert opinion at issue, the record reflects  
12 that petitioner brought a counseled motion for new trial raising this issue and including a Child  
13 Abuse Investigation Report from Dr. O'Donohue. II CT 471-519 (ECF No. 15-2 at 180-228).

14 Finally, counsel failed to present evidence contradicting Jane Doe No. 1's testimony that  
15 she had been in petitioner's room. The evidence consisted of a drawing that petitioner had made  
16 of his room, which was corroborated by a drawing made by his sister and could have been further  
17 corroborated by photographs taken by an investigator. ECF No. 1 at 8. No drawings or other  
18 evidence are provided. The record reflects that petitioner brought a pro se motion for new trial  
19 which, among other things, referenced counsel's failure to present petitioner's "floorplan." II CT  
20 528 (ECF No. 15-2 at 237).

## 21 2. Appellate Counsel

22 In Claim One, petitioner alleges that his appellate lawyer refused to raise the claim of  
23 ineffective assistance of trial counsel which had first been "presented in a new motion for retrial  
24 in the trial court." ECF No. 1 at 5. "Appellate counsel claimed that trial counsel showed tactical  
25 reasoning for not bringing the evidence in the motion at trial. However, due to trial counsel's  
26 failure to investigate, the evidence was not wholly available to trial counsel." Id. (spelling  
27 corrected). The statement of this claim does not identify the evidence at issue or specify the  
28 nature of trial counsel's alleged failure to investigate. Nor does it specify the specific ineffective

1 assistance of counsel (IAC) claims that appellate counsel refused to include on appeal.

2 The trial IAC claims presented to this court in Claim Two were all included in motions for  
3 a new trial brought in the superior court. Only the IAC issue related to the cellphone was raised  
4 on appeal. See ECF No. 15-8 (Appellant's Opening Brief) at 2-3. It is unclear whether petitioner  
5 alleges that appellate counsel should have challenged the cellphone search and alleged related  
6 ineffective assistance of trial counsel on additional grounds.

### 7 C. The Clearly Established Federal Law

8 To establish a constitutional violation based on ineffective assistance of counsel, a  
9 petitioner must show (1) that counsel's representation fell below an objective standard of  
10 reasonableness, and (2) that counsel's deficient performance prejudiced the defense. Strickland,  
11 466 U.S. 668, 692, 694 (1984). The proper measure of attorney performance is objective  
12 reasonableness under prevailing professional norms. Id. at 688. There is a rebuttable  
13 presumption that counsel's strategic choices are reasonable. Id. at 694-695. Prejudice means that  
14 the error actually had an adverse effect on the defense and that there is a reasonable probability  
15 that, but for counsel's errors, the result of the proceeding would have been different. Id. at 693-  
16 694. The court need not address both prongs of the Strickland test if the petitioner's showing is  
17 insufficient as to one prong. Id. at 697.

18 A criminal defendant enjoys the right to the effective assistance of counsel on appeal as  
19 well as at trial. Evitts v. Lucey, 469 U.S. 387, 391 (1985). Claims of appellate ineffectiveness are  
20 evaluated under the Strickland framework. Smith v. Robbins, 528 U.S. 259, 285 (2000). To  
21 demonstrate prejudice in the appellate context, petitioner must show a reasonable probability that  
22 he would have prevailed on appeal absent counsel's alleged errors. Smith, 528 U.S. at 285-286.

### 23 D. The State Courts' Rulings

#### 24 1. Ineffective Assistance of Trial Counsel

##### 25 a. Failure to Challenge Cellphone Search and Resulting Evidence

26 The core of this claim was presented on direct appeal. Because the California Supreme  
27 Court denied discretionary review, the opinion of the California Court of Appeal constitutes the  
28 last reasoned decision on the merits and is the subject of habeas review in this court. See Ylst v.

1 Nunnemaker, 501 U.S. 797 (1991); Ortiz v. Yates, 704 F.3d 1026, 1034 (9th Cir. 2012).<sup>4</sup>

2 The Court of Appeal ruled as follows:

3 Defendant next contends he was denied effective assistance of  
4 counsel because trial counsel failed to challenge the admission of  
images of child pornography on his cell phone.

5 *A. Background*

6 Detective Phelps arrested defendant on August 8, 2012, and seized  
7 his cell phone. Police searched the phone incident to arrest; they  
used a virtual memory dump which does not download the entire  
8 memory. [fn.: At the time, a warrantless search of a cell phone  
incident to arrest was authorized by *People v. Diaz* (2011) 51  
9 Cal.4th 84, later overruled by *Riley v. California* (2014) 573 U.S.  
373.] At the time, the police were interested in text messages. They  
10 found nothing illegal on defendant's phone.

11 During a jail visit a few days later, D.S. told defendant J.D. had  
accused him of molesting her. He denied the allegations, but stated  
12 the police had taken his phone as evidence. He had sent several e-  
mails to doctors and defendant declared, "That's evidence against  
13 me." When D.S. asked what was in the e-mails, defendant said,  
"Just what [his sister] told you I said." Detective Phelps took this to  
14 mean defendant said something in the e-mail that might tend to  
incriminate him.

15 Detective Phelps then prepared a search warrant. He recited the  
facts set forth above, as well as that defendant had admitted some  
16 abuse in text messages and a pretext phone call, and declared his  
belief that there was sufficient cause that defendant's phone  
17 contained evidence that defendant had perpetrated lewd and  
lascivious acts with a child. The magistrate issued the warrant,  
18 authorizing the search of "[a]ny and all emails or other electronic  
communications, which are stored within the memory of said cell  
19 phone, that tend to show that alleged lewd acts with a child  
occurred." The warrant authorized the seizure of evidence of a  
20 felony and evidence "which tends to show that sexual exploitation  
of a child, in violation of Penal Code Section 311.3, has occurred or  
21 is occurring."

22 In a second forensic examination of defendant's phone, a greater  
amount of information was extracted. The information was stored  
23 on five DVDs. At trial, 25 images of nude underage females were  
admitted into evidence. The defense did not object to the admission  
24 of this evidence.

25 In a motion for a new trial, defendant claimed his trial counsel was  
ineffective for failing to move to suppress this evidence. He  
26 contended the search of his phone should have been limited to a  
search of e-mails. At a hearing, defendant's trial counsel testified he  
27

28 <sup>4</sup> Petitioner also included this issue in his state habeas petition, as the court discusses below.

1 did not move to suppress this evidence based on his understanding  
2 that under *People v. Diaz, supra*, 51 Cal.4th at page 84, the police  
could search the cell phone incident to arrest without a warrant.

3 B. *Analysis*

4 “To secure reversal of a conviction upon the ground of ineffective  
5 assistance of counsel under either the state or federal Constitution, a  
6 defendant must establish (1) that defense counsel’s performance fell  
7 below an objective standard of reasonableness, i.e., that counsel’s  
8 performance did not meet the standard to be expected of a  
reasonably competent attorney, and (2) that there is a reasonable  
probability that defendant would have obtained a more favorable  
result absent counsel’s shortcomings.” (*People v. Cunningham*  
(2001) 25 Cal.4th 926, 1003.)

9 Defendant contends the affidavit for the search warrant provided  
10 probable cause to search his phone only for e-mails, not for child  
pornography. The warrant allowed the search and seizure of  
11 “emails or other electronic communications.” Images are a form of  
communication. (*In re Ryan D.* (2002) 100 Cal.App.4th 854.) Thus,  
12 the question is whether the affidavit provided probable cause to  
search electronic communications other than e-mails.

13 “It is settled law that the magistrate must make ‘a practical,  
14 commonsense decision’ whether, under all the circumstances  
described in the affidavit, there is ‘a fair probability’ that evidence  
of a crime will be found in a particular place.” (*People v. Lee*  
15 (2015) 242 Cal.App.4th 161, 175.) “[T]he magistrate’s  
determination will not be overturned unless the supporting affidavit  
16 fails as a matter of law to support the finding of probable cause.  
[Citations.] Doubtful or marginal cases are resolved in favor of  
17 upholding the warrant. [Citations.]” (*Fenwick & West v. Superior*  
*Court* (1996) 43 Cal.App.4th 1272, 1278.)

18 Detective Phelps’s affidavit indicated defendant had admitted some  
19 abuse in messages to Jane Doe No. 1’s mother and in a pretext  
phone call. It provided evidence in the form of defendant’s own  
20 statements that incriminating evidence might be found in emails on  
defendant’s phone. Since the affidavit established that incriminating  
21 evidence had been or likely could be found in various forms of  
communication using defendant’s phone, the magistrate could  
22 reasonably conclude such evidence might be found in other forms  
of electronic communication. The affidavit provided probable cause  
23 for the search warrant.

24 Defendant’s claim of ineffective assistance of counsel fails because  
he has not shown deficient performance by trial counsel. A  
25 challenge to admission of the child pornography on defendant’s  
phone would have failed. “Failure to raise a meritless objection is  
26 not ineffective assistance of counsel.” (*People v. Bradley* (2012)  
208 Cal.App.4th 64, 90.)

b. Failure to Present Expert Witness Testimony and Diagram of Room

Petitioner made these allegations of ineffective assistance in a habeas petition to the California Supreme Court. ECF No. 15-26 at 4-5. That petition was denied as follows:

The petition for writ of habeas corpus is denied. (*See In re Clark* (1993) 5 Cal.4th 750, 767-769 [courts will not entertain habeas corpus claims that are successive]; *People v. Duvall* (1995) 9 Cal.4th 464, 474 [a petition for writ of habeas corpus must include copies of reasonably available documentary evidence]; *In re Swain* (1949) 34 Cal.2d 300, 304 [a petition for writ of habeas corpus must allege sufficient facts with particularity].)

ECF No. 15-27.

2. Ineffective Assistance of Appellate Counsel

Petitioner presented this claim in the same habeas petition to the California Supreme Court. ECF No. 15-26 at 3. That petition was denied with citation to Clark, Duvall and Swain, as above. ECF No. 15-27.

E. Objective Reasonableness Under § 2254(d)

1. Ineffective Assistance of Trial Counsel

a. Failure to Challenge Cellphone Search and Resulting Evidence

It was not objectively unreasonable for the California Court of Appeal to conclude that a motion to suppress would have been futile, necessarily dooming the ineffective assistance of counsel claim. The bottom line is that California law authorized the warrantless search of a cell phone incident to arrest at the time that petitioner's phone was seized. See People v. Diaz, 51 Cal.4th 84 (2011). It is of no relevance to the ineffective assistance claim that the U.S. Supreme Court later came to a different conclusion on the Fourth Amendment issue. See Riley v. California, 573 U.S. 373 (2014). Whether or not the evidence from petitioner's phone was beyond the scope of the warrant or its seizure supported by probable cause, the state of California law at the time was such that a reasonable defense lawyer could well have considered the issue a waste of time. Accordingly, it was not objectively unreasonable to deny the IAC claim on the performance prong.

Moreover, the appellate court's discussion of probable cause and the scope of the warrant demonstrates that there are multiple grounds on which a motion to suppress could have been

1 denied in the trial court. It is therefore clear that petitioner cannot establish the reasonable  
2 probability of a different result had counsel brought a motion. Indeed, even if the cellphone  
3 evidence had been excluded, what is needed to establish prejudice on a Strickland claim is  
4 reasonable probability of a different *verdict*. See Strickland, 466 U.S. at 693 (describing  
5 prejudice standard as a probability sufficient to undermine the court's confidence in the verdict).  
6 This is not a case in which the granting of a motion to suppress dooms the government's ability to  
7 prove its case in chief. There was direct evidence of molestation in the form of Jane Doe No. 1's  
8 testimony. And petitioner's prior convictions for acts of child molestation provided more  
9 powerful and more relevant propensity evidence than the images found on the phone.  
10 Accordingly, it is highly unlikely that exclusion of the evidence would have affected the verdict.

11 Finally, to the extent that petitioner supplemented this claim in his state habeas petition to  
12 add the allegation that counsel failed to obtain a forensic examination of the cellphone, which  
13 would have shown that petitioner had not made the pornography downloads intentionally (see  
14 ECF No. 22 at 4), this allegation is not clearly included in the federal § 2254 petition. See ECF  
15 No. 1 at 7.<sup>5</sup> Moreover, such an allegation would not change the result. Because petitioner  
16 provided no facts in state habeas regarding what a forensic examination would have revealed, and  
17 no proffer of an expert opinion, summary denial of the Strickland claim was not only reasonable  
18 but required. See Wildman v. Johnson, 261 F.3d 832, 839 (9th Cir. 2001); Hendricks v.  
19 Calderon, 70 F.3d 1032, 1042 (9th Cir. 1995); Jones v. Gomez, 66 F.3d 199, 204-05 & n.1 (9th  
20 Cir. 1995), cert. denied, 517 U.S. 1143 (1996).

21 For all these reasons, federal habeas relief is unavailable on the ground that trial counsel  
22 failed to seek suppression of evidence seized from the cellphone.

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25 <sup>5</sup> The federal petition alleges that counsel "failed to do any investigation" of the cellphone, but  
26 unlike the state petition does not mention forensic analysis, or expert review, or a potential  
27 "inadvertent download" theory. Petitioner alleges only that counsel failed to review the  
28 download that was provided in discovery. ECF No. 1 at 7. Failure to have identified the  
damaging evidence in advance of trial may be relevant to the failure to bring motion to suppress,  
which was raised on appeal, but does not without more provide additional grounds for relief.

b. Failure to Present Expert Witness Testimony

To the extent the California Supreme Court denied this claim on the basis of state habeas procedural rules, the claim may arguably be defaulted. See Coleman v. Thompson, 501 U.S. 722, 750 (1991). Respondent does not assert the affirmative defense of procedural default; the answer addresses only the reasonableness of the state courts' rejection of the claim. Even if it had been raised, the undersigned would elect to bypass the issue of default because the claim may easily be resolved on the merits. See Lambrix v. Singletary, 520 U.S. 518, 525 (1997) (a procedurally defaulted claim may be denied on the merits). To the extent there was no merits adjudication of the federal claim in state court, § 2254(d) limitations on relief do not apply and the undersigned considers the claim de novo. See Pirtle v. Morgan, 313 F.3d 1160, 1167-1168 (9th Cir. 2002). For the reasons that follow, the result would be the same if the California Supreme Court's order were considered a summary merits denial and reviewed for § 2254 reasonableness under Richter, 562 U.S. at 102.

Petitioner is not entitled to relief on the ground that trial counsel failed to present the testimony of Dr. O'Donohue, for the simple reason that O'Donohue's opinion was limited to the MDIC interview of Jane Doe No. 2 and petitioner stands convicted only of crimes against Jane Doe No. 1. The report submitted to defense counsel by Dr. O'Donohue—which was not attached to any state or federal habeas petition by way of proffer—is located in the trial record as an attachment to one of petitioner's motions for new trial, II CT 499-519 (ECF No. 15-2 at 208-228). It is an evaluation of the techniques used in the MDIC interview of Jane Doe No. 2. Id. This court need not entertain the question whether the failure to present Dr. O'Donohue's testimony in defense of the Jane Doe No. 2 count constituted unreasonable performance, because petitioner's conviction on that count was overturned on appeal. Nothing in the O'Donohue report had exculpatory or impeachment value as to Jane Doe No. 1, who was not the subject of the report. Accordingly, even assuming error in counsel's decision not to use the expert opinion as to Jane

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1 Doe No. 2, that error cannot have affected the verdict on the Jane Doe No. 1 counts.<sup>6</sup> Absent a  
 2 showing of exculpatory evidence that the expert would have provided as to Jane Doe No. 1, this  
 3 claim fails.

4 Petitioner’s conclusory allegations in this regard cannot support relief under Strickland.  
 5 See James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) (conclusory allegations do not merit habeas  
 6 relief). Absent facts which could establish prejudice, specifically a proffer of available expert  
 7 testimony that would with “reasonable probability” have resulted in a different verdict, this claim  
 8 fails under any standard of review. See Wildman, 261 F.3d at 839 (petitioner failed to show  
 9 prejudice where he “offered no evidence that an arson expert would have testified on his behalf at  
 10 trial. He merely speculates that such an expert could be found.”); Hendricks, 70 F.3d at 1042  
 11 (“Absent an account of what beneficial evidence investigation into any of these issues would have  
 12 turned up, [petitioner] cannot meet the prejudice prong of the Strickland test.”).

### 13 c. Failure to Present Diagram of Room

14 Here too the court elects to bypass consideration of any arguable default. This alleged  
 15 instance of ineffective assistance is entirely conclusory and must be rejected on that basis. Although  
 16 petitioner identifies the evidence he thinks counsel should have used—a hand-drawn diagram of  
 17 his floorplan—both the state and federal petitions are lacking any such diagram or any specific  
 18 description of such a diagram, let alone an explanation of how that diagram would have  
 19 demonstrated that Jane Doe No. 1 had not been in petitioner’s room. No prima facie Strickland  
 20 claim arises from these allegations.

### 21 3. Ineffective Assistance of Appellate Counsel

22 For the reasons already explained, petitioner’s allegations of ineffective assistance of trial  
 23 counsel fail to provide grounds for relief. This dooms the claim of ineffective appellate

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24  
 25 <sup>6</sup> Dr. O’Donohue testified at the hearing on the new trial motion. II CT 565-566 (ECF No. 15-2  
 26 at 274-275). His testimony that he had not been provided with all relevant records and  
 27 information was a reference to records pertaining to Jane Doe No. 2. III RT 679-684 (ECF No.  
 28 15-6 at 116-121). Although the hearing did also inquire into Dr. O’Donoghue’s thoughts  
 regarding Jane Doe No. 1, neither the new trial motion and its attachments, the hearing transcript,  
 nor anything the undersigned has identified in the various habeas petitions, includes a proffer of  
 expert testimony specific to Jane Doe No. 1.

representation. Appellate counsel has no constitutional obligation to raise even non-frivolous issues which, in counsel's judgment, have little or no likelihood of success. Jones v. Barnes, 463 U.S. 745, 751-54 (1983). To the contrary, winnowing out weak arguments on appeal is a hallmark of effective advocacy, not an indicator of ineffectiveness. Smith v. Murray, 477 U.S. 527, 536 (1986); see also Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989). The presumption of effective appellate advocacy is overcome only where the omitted issues are "clearly stronger" than those presented on appeal. Smith v. Robbins, 528 U.S. at 288.

Here it is clear from the appellate record that counsel focused on the strongest issues, including the successful Confrontation Clause challenge to admission of the Jane Doe No. 2 MDIC interview. This resulted in one of the three substantive counts of conviction being reversed, along with a sentencing enhancement for multiple victims. Because the primary issue that appellate counsel pursued was meritorious and those forwarded here are not, petitioner cannot obtain habeas relief on grounds of ineffective appellate counsel. The facts and procedural history of this case are incompatible with unreasonable appellate performance and with prejudice from the winnowing of potential appellate issues.

## II. Claim Three: "Reversible Prejudicial Court Error"

### A. Petitioner's Allegations and Pertinent State Court Record

Petitioner seeks relief on the basis of "reversible prejudicial court error." The supporting facts are, in full, as follows:

The nature of Count 3 was extremely prejudicial to Defendant. While such charges are always difficult, the presence of multiple victims make them all the worse. Had this prejudicial error not occurred, defendant would have only had to deal with a single victim lessening his burden of proof.

ECF No. 1 at 9.

The undersigned construes this claim as asserting that the jury's exposure to the MDIC interview of Jane Doe No. 2, which was admitted in violation of petitioner's rights under the Confrontation Clause, also rendered the trial fundamentally unfair as to the Jane Doe No. 1 counts of which petitioner stands convicted.

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1           B. The Clearly Established Federal Law

2           The erroneous admission of evidence violates due process only if the evidence is so  
3 irrelevant and prejudicial that it renders the trial as a whole fundamentally unfair. Estelle v.  
4 McGuire, 502 U.S. 62 (1991). The Supreme Court has rejected the argument that due process  
5 necessarily requires the exclusion of prejudicial or unreliable evidence. See Spencer v. Texas,  
6 385 U.S. 554, 563-564 (1967); Perry v. New Hampshire, 565 U.S. 228, 245 (2012).

7           C. The State Court's Ruling

8           This issue was presented to the California Supreme Court as part of a claim that admission  
9 of the Jane Doe No. 2 evidence, in combination with ineffective assistance of counsel, constituted  
10 “reversible prejudicial error.” ECF No. 15-26 at 6. The state court rejected the claim on the state  
11 law grounds discussed above. ECF No. 15-27.

12           D. Objective Unreasonableness Under § 2254(d)

13           For the reasons that follow, federal habeas relief is unavailable. It is undeniable that the  
14 Jane Doe No. 2 MDIC interview, which was admitted in violation of petitioner's rights under the  
15 Confrontation Clause, constituted powerful propensity evidence entirely apart from its probative  
16 value vis-à-vis the Jane Doe No. 2 count. The undersigned finds it entirely plausible that the  
17 jury's exposure to that evidence influenced the jury as to the Jane Doe No. 1 counts. However, a  
18 plausible theory of prejudice does not support habeas relief in federal court.

19           To the extent that § 2254(d) standards apply, see Richter, 562 U.S. at 102, relief is  
20 unavailable because no U.S. Supreme Court precedent has found the admission of prejudicial or  
21 propensity evidence to violate due process. See Wright v. Van Patten, 552 U.S. 120, 125-26  
22 (2008) (per curiam) (if no Supreme Court precedent controls a legal issue raised by a habeas  
23 petitioner in state court, the state court's decision cannot be contrary to, or an unreasonable  
24 application of, clearly established federal law); see also Holley v. Yarborough, 568 F.3d 1091,  
25 1101 (9th Cir. 2009) (Supreme Court has not clearly held that the “admission of irrelevant or  
26 overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of  
27 the writ.”); Alberni v. McDaniel, 458 F.3d 860, 866 (9th Cir. 2006) (recognizing that U.S.

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1 Supreme Court has never held propensity evidence violates due process), cert. denied, 549 U.S.  
2 1287 (2007).

3 Even if the claim is reviewed de novo, petitioner cannot prevail. Proof of actual prejudice  
4 to the defense case from a trial error is “a necessary but not sufficient element of a due process  
5 claim.” United States v. Lovasco, 431 U.S. 783, 790 (1977). The undersigned cannot conclude  
6 that the trial of the Jane Doe No. 1 counts was rendered fundamentally unfair by the jury’s  
7 exposure to the Jane Doe No. 2 interview. See Estelle, 502 U.S. at 72 (recognizing fundamental  
8 fairness as the touchstone of due process). Petitioner had been previously convicted of child  
9 molestation, and under California law—which expressly permits the consideration of propensity  
10 evidence in sex offense cases, see Cal. Evid. Code § 1108—those convictions were properly  
11 before the jury. The jury also was permitted to consider the fact that images of child pornography  
12 were found on petitioner’s phone. In other words, there was ample propensity evidence  
13 independent of the Jane Doe No. 2 interview, rendering that evidence cumulative. The jury was  
14 instructed on the prosecutor’s burden of proving the elements of each count beyond a reasonable  
15 doubt, and was specifically instructed that propensity evidence is not sufficient by itself to prove  
16 guilt, which must be proved by the prosecution beyond a reasonable doubt. II CT 300, 327 (ECF  
17 No. 15-2 at 9, 36). The jury is presumed to have followed those instructions. See Weeks v.  
18 Angelone, 528 U.S. 225, 234 (2000). Jane Doe No. 1 testified and was subject to cross-  
19 examination, and the jury was able to evaluate her credibility. The evidence as to Jane Doe No. 1  
20 was not so close that there is a reasonable likelihood the propensity evidence influenced the jury  
21 so as to relieve the prosecution of its burden of proof, as petitioner alleges.

22 In light of the trial record as a whole, this is simply not a case in which admission of the  
23 evidence violates “fundamental conceptions of justice.” Lovasco, 431 U.S. at 790 (quoting  
24 Mooney v. Holohan, 294 U.S. 103, 112 (1935)). In Dowling v. United States, 493 U.S. 342  
25 (1990), the defendant claimed that his due process rights were violated by the testimony at his  
26 robbery trial of the victim of another robbery, of which he had been acquitted. The Supreme  
27 Court held that introduction of the evidence did not violate the due process test of fundamental  
28 fairness. Id. at 352. Here as in Dowling, the possibility of prejudice from the evidence does not

1 establish a violation of “those ‘fundamental conceptions of justice which lie at the base of our  
2 civil and political institutions’ ... and which define ‘the community’s sense of fair play and  
3 decency.’” Id. at 353 (citations omitted). For all these reasons, petitioner is not entitled to relief.

4 III. Claim Four: Illegal Search of Cell Phone

5 A. Petitioner’s Allegations and Pertinent State Court Record

6 Petitioner alleges that his cell phone was seized when he was arrested on August 8, 2012.  
7 A warrant for a search of the phone was subsequently prepared on the basis of a recorded jail  
8 visit, in which petitioner told his wife that he had emailed a psychiatrist and said, “That’s  
9 evidence against me.” The warrant sought emails and other electronic communications. A  
10 complete extraction of the cellphone was then performed on October 17, 2012. A special master  
11 was appointed to review extracted emails because of the potential for privileged communications.  
12 On January 9, 2014, the prosecutor reviewed extracted data other than the emails, and found  
13 “several photos of underage females posing in underwear and swimsuits.” The photo albums on  
14 the phone did not come within the scope of the search warrant. ECF No. 1 at 11-12.

15 This issue was the subject of a motion for new trial, II CT 452-467 (ECF No. 15-2 at 161-  
16 176), and was raised and rejected on direct appeal, ECF No. 15-8 at 3.

17 B. This Claim is Non-Cognizable in Federal Habeas

18 Where a state provides an opportunity for full and fair litigation of a Fourth Amendment  
19 claim, a state prisoner may not be granted federal habeas corpus relief on the ground that the  
20 evidence obtained in an unconstitutional search or seizure was introduced at trial. Stone v.  
21 Powell, 428 U.S. 465, 482 (1976). Stone effectively renders Fourth Amendment claims  
22 unreviewable in federal habeas, except in cases where the state failed to provide a forum for  
23 litigation of the issue. When a state prisoner presents a Fourth Amendment claim in federal  
24 habeas, “[t]he relevant inquiry is whether petitioner had the opportunity to litigate his claim, not  
25 whether he did in fact do so or even whether the claim was correctly decided.” Ortiz-Sandoval v.  
26 Gomez, 81 F.3d 891, 899 (9th Cir. 1996). The Ninth Circuit has held that California’s statutory  
27 framework for litigating suppression issues satisfies the “full and fair opportunity” requirement  
28 under Stone v. Powell. Gordon v. Duran, 895 F.2d 610, 613-14 (9th Cir. 1990). Because

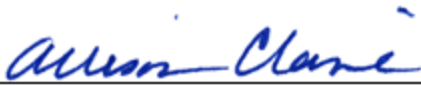
petitioner had the required opportunity to litigate in state court, federal habeas relief is unavailable as a matter of law. See Myers v. Rhay, 577 F.2d 504, 508 (9th Cir. 1978) (even assuming unconstitutional arrest, Stone bars relief); Terrovona v. Kincheloe, 912 F. 2d. 1176, 1178 (9th Cir. 1990) (Stone bars federal review of a state prisoner's warrantless arrest claim).

### CONCLUSION

For all the reasons explained above, the state courts' denial of petitioner's claims was not objectively unreasonable within the meaning of 28 U.S.C. § 2254(d). Even without reference to AEDPA standards, petitioner has not established any violation of his constitutional rights. Accordingly, IT IS HEREBY RECOMMENDED that the petition for writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." If petitioner files objections, he shall also address whether a certificate of appealability should issue and, if so, why and as to which issues. See 28 U.S.C. § 2253(c)(2). Any reply to the objections shall be served and filed within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: November 5, 2024

  
ALLISON CLAIRE  
UNITED STATES MAGISTRATE JUDGE